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Nos. 06-340 and 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CROPLIFE AMERICA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether the court of appeals correctly held that the decision of the Environmental Protection Agency ("EPA") to transfer pollution permitting authority to Arizona under the Clean Water Act, *see* 33 U.S.C. § 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1536(a)(2); and, if so, whether the court of appeals should have remanded to the EPA for further proceedings without ruling on the interpretation of ESA § 7(a)(2)?

2. If the court below should have remanded to obtain the agencies' construction of ESA § 7(a)(2) without imposing the panel's preferred construction, now that the agencies' construction has been obtained, should this Court reach the merits of the ESA § 7(a)(2) interpretive issue decided by the court below?

3. Whether procedural "consultation" under ESA § 7(a)(2) necessarily applies to precisely the same set of "action[s] authorized, funded, or carried out by such [federal] agency" as does § 7(a)(2)'s substantive constraints that such actions be "not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of" designated critical habitat?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae CropLife America[1] supports reversal of the divided Ninth Circuit panel opinion below, which found that § 7(a)(2) of the Endangered Species Act ("ESA")[2] overrides the Clean Water Act ("CWA") § 402(b), 33 U.S.C. § 1342(b), standards for approving a State program to issue National Pollutant Discharge Elimination System ("NPDES") permits (sometimes called a "transfer" of jurisdiction). *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005) (Fed. Pet. App. 1a-67a), *reh'g denied*, 450 F.3d 394 (9th Cir. 2006) (Fed. App. 68a-92a) ("*Defenders*"). The court below declined to remand to obtain the interpretation by the agencies charged with implementing ESA § 7(a)(2),[3] and imposed its own misguided interpretation. The agencies have now clearly stated their construction that, due to EPA's lack of discretion

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than CropLife, its members, and its counsel made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief. All parties other than the United States submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. The Federal Petitioner's written consent to the filing of this brief has been filed with the clerk.

[2] "Each Federal agency shall, in consultation with and with the assistance of the Secretary [who acts through the U.S. Fish and Wildlife Service ('FWS') or National Marine Fisheries Service ('NMFS') (collectively, the 'Services')], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species ['listed species'] or result in the destruction or adverse modification of" designated critical habitat. 16 U.S.C. § 1536(a)(2).

[3] Those agencies are: (1) the agency proposing the action ("action agency"), in this instance the Environmental Protection Agency ("EPA"); and (2) the Services, who have a "consultation" role under ESA § 7(a)(2).

under CWA § 402(b), ESA § 7(a)(2) does not apply to the transfer. Fed. App. 93a-116a.

CropLife America is the nationwide not-for-profit trade organization representing the major manufacturers, formulators, and distributors of crop protection and pest control products. CropLife is headquartered in Washington, D.C. Its member companies produce, sell, and distribute virtually all the crop protection, specialty, and biotechnology products used by American farmers, professional users, and consumers, including the vast majority of pesticides registered by EPA under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").

CropLife and its members seek to establish an efficient and effective procedure by which EPA can comply with ESA § 7 in conjunction with registering pesticides under FIFRA. Thus, CropLife has an interest in securing judicial interpretations of ESA § 7 that will achieve the purposes of the ESA without imposing additional barriers to activities of the regulated community under organic statutes such as FIFRA or, as in this case, the CWA. The Ninth Circuit's reasoning below threatens to "modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* agency." *Defenders*, 450 F.3d at 398-99 and n.4, 401 (Kozinski, J., dissenting) (Fed. App. 69a, 74a-79a, 82a). Indeed, CropLife is party to pending litigation under the ESA and FIFRA in which the district court issued an unfavorable ruling based in part on the Ninth Circuit's reasoning in the instant case. *See Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1177-78 (W.D. Wash. 2006) (quoting *Defenders*, 420 F.3d at 961), *appeals pending*, Nos. 06-35873, 06-35891, 06-35899 (9th Cir.).

SUMMARY OF ARGUMENT

Amicus would answer the question(s) posed by this Court as follows. First, once the Ninth Circuit found an inconsistency in EPA's position, it erred in not remanding to obtain the EPA's and FWS's construction of a statute they administer. The panel should not have imposed its preferred construction of ESA § 7(a)(2) on them. *Gonzales v. Thomas*, 126 S. Ct. 1613, 1614-15 (2006); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Second, the purpose of a remand – obtaining the expert agencies' views – has now been achieved by the agencies' uniform interpretation that ESA § 7(a)(2) does not apply to or constrain a transfer of jurisdiction under the exclusive standards in CWA § 402(b). *See* Fed. App. 93a-116a. As a result, this case is well-positioned for this Court to provide much-needed guidance on the issue that the court below decided and that has divided the lower courts. That recurring and important issue is: Does ESA § 7(a)(2) override the directives of other statutes, or does § 7(a)(2) operate only where another statute confers authority on the action agency to act based on wildlife considerations?

Third, EPA was not arbitrarily inconsistent. EPA, by initiating consultation and receiving ESA § 7(a)(2) clearance from FWS, rationally avoided a litigation issue on whether "consultation" was required. Because the leading opinion of the era stated the ESA "requires EPA to consult" before undertaking agency action, EPA did not act arbitrarily in initially following that guidance. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298-99 (5th Cir. 1998).

Section I of this brief develops those themes. Section II alerts the Court to the Ninth Circuit's mistaken assumption that the procedural "consultation" and the substantive aspects

of ESA § 7(a)(2) must apply to the precisely same class of "agency actions." The current ESA § 7 rules in 50 C.F.R. Part 402, and the timely provision of federal permits and services, depend on a different view. Under that view (ratified by Congress), "consultation" with the Services is not universally required before any of the thousands of actions federal agencies take each day can be implemented.

ARGUMENT

I. While The Court Below Erred In Not Stopping And Remanding Once It Found EPA's Actions To Be Arbitrarily Inconsistent, The Agencies' Final Interpretation Of ESA § 7(a)(2) Is Before This Court. This Court Should Provide Much-Needed Guidance On The Scope Of ESA § 7(a)(2).

In granting review on January 5, this Court added the first Question Presented at page i. CropLife's second Question Presented is the logical follow-up. The Court posed its question in light of the following fact pattern.

In the Ninth Circuit, the panel majority (Judges Berzon and Reinhardt) reasoned an agency's action must be reviewed on the "grounds . . . upon which the record discloses that its action was based" (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). *Defenders*, 420 F.3d at 960 (Fed. App. 25a). EPA allegedly had stated that ESA "section 7 requires consultation regarding the effect of a permitting transfer on listed species" because its action "'may affect'" listed species." *Id.* at 959-60 (Fed. App. 23a, 25a). But, FWS "reasoned that there could be no such effect" caused by any discretionary EPA action, due to the mandatory nature of a transfer if the CWA § 402(b) standards are met. EPA then transferred authority based on that biological opinion. *Id.* at 961 (Fed. App. 26a-27a). The panel felt that "EPA decided

that it had to consult but had no authority to do anything concerning the matter about which it had to consult" and that this was arbitrarily inconsistent because "[*b*]*oth* the consultation obligation and the obligation to 'insure' against jeopardizing listed species are triggered" by the same set of agency actions. *Id.* "Because EPA's "decisionmaking was based on contradictory views of the same words in the same statutory provision," EPA acted arbitrarily and the "transfer decision cannot stand." *Id.* at 961-62 (Fed. App. 27a-28a). Though the panel concluded "we must remand to the agency for a plausible explanation . . . based on a single, coherent interpretation of the statute" (*id.* at 962 (Fed. App. 28a)), the panel then went on to explain and impose its own views on how ESA § 7(a)(2) should operate. *Id.* at 962-71 (Fed. App. 28a-48a).

The distinct portions of the Court's question, and the logical follow-up, are answered in the subsections below.

A. The Court Below Erred In Imposing Its View On The Scope Of ESA § 7(a)(2) Without First Remanding To Obtain The Agencies' Construction Of A Statute They Administer

1. Before the Ninth Circuit panel, Defenders of Wildlife did *not* urge the transfer be set aside on the ground that federal agencies were interpreting ESA § 7(a)(2) inconsistently as to procedural consultation and substantive constraints.[4] Nor did Defenders cite *SEC v. Chenery Corp.*,

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[4] As illustrated by the "Issue Presented for Review" in its opening brief, Defenders of Wildlife pursued different ESA § 7 compliance issues: "Whether EPA violated the [ESA] . . . by relying on FWS's BO [biological opinion] in determining that its transfer action is not likely to jeopardize the continued existence of listed species . . . where the BO is not based on the best scientific data available, fails to adequately analyze all of the effects on listed

(continued....)

on which the panel relied. Contrary to the case law under Federal Rule of Appellate Procedure 28(a), the court below reached out to find that EPA acted arbitrarily on a ground not asserted in Defenders' opening appellate brief. Thus, the Ninth Circuit panel erred by deciding an "inconsistency" issue the parties had not briefed.

2. As will be shown in Section I.C, below, the reviewable final actions by EPA and FWS were not arbitrarily inconsistent as to ESA § 7(a)(2)'s scope regarding procedures (consultation) and substance (avoiding discretionary federal actions likely to jeopardize a listed species' existence). But, the panel found EPA had been "contradictory."

This Court has asked whether, once the court of appeals found EPA's current position to be arbitrary, the panel should have remanded to EPA for a coherent legal interpretation without a panel ruling on the meaning of ESA § 7(a)(2). Our answer is "yes." The panel should have remanded and stopped there.

The panel understood that it had a duty to remand. "We must remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute." *Defenders*, 420 F.3d at 962 (Fed. App. 28a). Inconsistent with a remand to the agency and its embedded

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(continued) . . .
species . . ., fails to meaningfully consider the status and environmental baselines of each affected species and critical habitat, and ignores cumulative effects." Petitioners' [Defenders'] Opening Br. at 2 (9th Cir. Sept. 18, 2003). The panel addressed the issues presented by Defenders of Wildlife only near the tail end of its opinion. *See Defenders*, 420 F.3d at 972-77 (Fed. App. 48a-52a).

concept of primary agency jurisdiction,[5] the panel then inexplicably went on, at considerable length, to state as binding precedent its views on how ESA § 7(a)(2) should operate. *Id.* at 962-71 (Fed. App. 28a-48a). Judge Kozinski correctly chastises the panel for concluding an issue should be "remanded to EPA for further clarification," but then "embark[ing] on a 17-page boondoggle, conducting the very analysis that EPA should have had an opportunity to conduct for itself." *Defenders*, 450 F.3d at 397 (Fed. App. 72a).

Here again, the "Ninth Circuit's failure to remand is legally erroneous" – the panel erred in determining a matter "in the first instance" without obtaining EPA's and FWS's views of statutes they administer. *Gonzales v. Thomas*, 126 S. Ct. at 1614-15. "[T]the proper course, except in rare circumstances, is to remand to the agency for additional" explanation. "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions." *Florida Power & Light*, 470 U.S. at 744.

Absent "special circumstances," the "ordinary" remedy is "vacat[ing] the judgment of the Court of Appeals" and remanding so the agency can "decid[e] whether the facts as found fall within a statutory term." *Gonzales*, 126 S. Ct. at 1615. Thus, the court below committed reversible error in opining on how ESA § 7(a)(2) should operate.

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[5] *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65-67 (2004) ("protect agencies from undue judicial interference with their lawful discretion"); *Florida Power & Light*, 470 U.S. at 744; *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-65 (1956).

B. The Agencies' Interpretation Of ESA § 7(a)(2) Provides The Information That Would Have Been Obtained By A Remand. This Court Should Provide Guidance On The ESA § 7(a)(2) Issue Decided Below.

1. This Court should *not* simply vacate most of the opinion below and remand to either the agency or the Ninth Circuit. Unlike in *Gonzales v. Thomas*, "special circumstances" exist here.

The purpose of the remand the Ninth Circuit should have ordered is, of course, to obtain the agencies' construction of statutes and rules they administer. Federal Petitioner has provided the information that would have been provided after a remand. At Fed. App. 96a-102a, 106a-10a, EPA and FWS provide their considered opinion that no part of ESA § 7(a)(2) (neither procedural "consultation" nor substantive avoidance of jeopardy) applies to CWA § 402(b) transfers. That supplies the "single, coherent interpretation of the statute" demanded by the court below. *Defenders*, 420 F.3d at 962 (Fed. App. 28a). Accordingly, the option of remanding to the agencies now is moot as a practical matter.

Nor would it be appropriate to vacate and remand to the Ninth Circuit. The opinion below and the denial of rehearing below make clear that the Ninth Circuit would reject, and has rejected, the agencies' current construction that ESA § 7(a)(2) does not apply to a CWA § 402(b) transfer.[6]

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[6] *See Defenders*, 420 F.3d at 962-71 (Fed. App. 31a-47a); *Defenders*, 450 F.3d 394 (Fed. App. 68a). Significantly, in explaining why the majority opinion should not be reheard on the remand-to-the-agencies basis asserted by Judge Kozinski, Judge Berzon states: "EPA did decide that a transfer was appropriate and that it did not have the authority to consider the impact on endangered and threatened species of the transfer decision. We disagree with (continued....)

Accordingly, vacating and remanding to the court below also would serve no purpose.

2. For many reasons, this Court should decide the recurring question regarding the scope of ESA § 7(a)(2). There is an active controversy on that question *vis a vis* CWA § 402(b) as applied to Arizona and to Alaska. Moreover, the precedent created below places at risk numerous other federalism-related transfers of jurisdiction to States, as well as federal licensing, registration, and permitting programs, under sundry environmental laws.

More generally, "[q]uestions as to the proper meaning and interpretation of [50 C.F.R.] § 402.03 [and ESA § 7(a)(2)] arise regularly in the courts." Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation*, 25 STAN. ENVTL. L.J. 125, 179 (2006). Over 20 lower court opinions have addressed that question in varying ways, leading to "discordant case law." *Id.* at 151-94. The Court's exercise of its supervisory authority would provide much-needed guidance to the lower courts and to regulated parties.

There is no bar to the Court's resolution of whether ESA § 7(a)(2) serves as a font of new, overriding authority. The court below clearly decided that question. This Court can review a question decided by the court below, even if it had not been raised by the parties in their briefs. *E.g.*, *Verizon Communications v. FCC*, 535 U.S. 467, 530 (2002); *United States v. Williams*, 504 U.S. 36, 41-45 (1992). Moreover, as the key arguments on Petitioners' side of that question were

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(continued) . . .
both conclusions" and the agency should not have additional "chances to consider a factual or legal question before appellate review." *Defenders*, 450 F.3d at 403 n.1 (Fed. App. 85a).

preserved in the Petitions for certiorari (and earlier),[7] Rule 14 prerequisites to reaching an issue have been satisfied.

Further, an alleged "inconsistency" in a party's prior position is "just one of several considerations" bearing on "whether to decide a question on which [the Court] granted certiorari." *United States v. Wells*, 519 U.S. 482, 487-89 (1997). Just as the Court concluded in *Wells* "it seems sensible to reach the question presented" (*id.*), it is sensible for the Court to decide the central ESA § 7(a)(2) interpretive issue on which certiorari was granted.

3. The Court should reject any argument that the agencies' interpretation of ESA § 7(a)(2) in Fed. App. 93a-116a can be ignored because it is *post hoc* and not allowed by *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The necessary consequence of any remand for an agency's additional explanation is the production of material that is "*post hoc*" in some sense. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). This is permissible, as the agency's explanation on a matter over which the Executive Branch agency has primary authority remains crucial for judicial review. *See id.* at 419-21; *Florida Power & Light*, 470 U.S. at 744. Hence, the supplemental information obtained by a remand to an agency, an agency declaration, or (here) formal agency letters trump the "basis" concerns in *SEC v. Chenery*.

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[7] The Petitioners' briefs to the panel below did not address whether ESA § 7(a)(2) consultation was required, as that was not an issue raised in Defenders of Wildlife's opening brief. *See* note 4, above. But, once the split panel opinion forced that issue front and center, EPA and FWS did provide their interpretation that ESA § 7(a)(2) did not apply – in a rehearing petition (at 6 n.1), the Federal Petition here, and the material in Fed. App. 93a-116a.

Further, while *Chenery* is sometimes perceived as limiting an agency to its contemporaneously-stated basis, the opinion does not prohibit later agency clarifications. For part of SEC's order (approving a reorganization plan for a public utility), SEC said it was applying the "broad equitable principles" in certain case law. This Court reviewed only the grounds "upon which the record discloses that its action was based." 318 U.S. at 87. But the Court also recognized it should not remand where an agency reached the right result but "upon a wrong ground or gave a wrong reason." *Id.* at 88. The Court found that principle inapplicable there because *Chenery* involved a "determination of policy and judgment which the agency alone is authorized to make and which it had not made." *Id.*

In contrast, the instant case stands in this Court with the agencies' "determination" – their legal interpretation that ESA § 7(a)(2) does not apply to CWA § 402(b) transfers.[8] The principle against considering a *post hoc* rationalization by counsel applies only "where the agency itself has articulated no position." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Here, the Court has the duly-considered interpretation by the agencies implementing ESA § 7(a)(2) and CWA § 402(b) that deserves deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001).

In comparable circumstances, this Court has given credit to such arguably "*post hoc*" legal interpretations. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United

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[8] This Court also mentioned *Chenery* in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). The Court found the agency's explanation was arbitrarily inadequate. While there was no subsequent agency explanation in *State Farm* and *Chenery*, there is one here.

States' legal interpretation on another ESA § 7 issue – whether the Services' rules in 50 C.F.R. Part 402 are binding on other agencies – was not settled until briefing before this Court. The four Justices reaching the issue credited and addressed the Solicitor General's interpretation that those rules do not bind other agencies. 504 U.S. at 568-71. In another decision, though an agency's final legal interpretation came before the Court "in the form of a legal brief," the Court considered that interpretation and rejected complaints it was a "*post hoc* rationalization." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

It is also relevant that *Chenery* was decided before adoption of the Administrative Procedure Act ("APA"). The APA now governs judicial review of ESA claims against federal agencies.[9] The APA, by providing that "due account shall be taken of the rule of prejudicial error," also reflects the concept of harmless error. 5 U.S.C. § 706. An alleged error is harmless if it did not prejudice the outcome or if the matter is clarified by the time it reaches the court. *E.g., Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 120-21 (9th Cir. 2004).

Here, the alleged error is the agencies' failure to state, at the time of transfer of NPDES authority to Arizona, that since ESA § 7(a)(2) does not bar the transfer, § 7(a)(2) consultation also does not apply. But that omission is not error – no ESA or APA principle required a statement regarding "consultation" at the time. At most, it is harmless error, inasmuch as it did not prejudice the outcome (the

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[9] *Bennett v. Spear*, 520 U.S. 154, 173-79 (1997); *see Cabinet Mts. Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982).

transfer). The alleged error or inconsistency did not affect the agencies' primary conclusion that ESA § 7(a)(2) does not override CWA § 402(b). The later, secondary clarification regarding no "consultation" duty is consistent with the primary conclusion. Further, at this point any error is harmless, because the agencies have now provided a more complete analysis.

Thus, this Court should decide the central substantive issue in this case: Does ESA § 7(a)(2) override directives and limitations Congress has prescribed in other statutes? That is a recurring issue of broad significance. The opinion below threatens to alter "*every* categorical mandate to *every* federal agency." *Defenders*, 450 F.3d at 399 n.4 (Kozinski, J., dissenting) (Fed. Pet. 78a). It is an issue on which there is a mature split in the circuits, and to which 20 lower courts have provided irreconcilable answers.[10]

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[10] Merely vacating the panel opinion would not eliminate the conflicts. While the opinion below is in the minority, it is not the sole outlier. *See, e.g., Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1289-93 (S.D. Fla. 2005), *appeal pending*, No. 05-16374-II (11th Cir.) (ESA § 7(a)(2) limits FEMA's flood insurance program).

Most pertinent to *Amicus* CropLife, the Ninth Circuit at least implicitly found that ESA § 7(a)(2) overrides other laws in *Washington Toxics Coal. v. U.S. Envtl. Prot. Agency*, 413 F.3d 1024 (9th Cir. 2005). That opinion concerned the remedy when ESA § 7(a)(2) consultation was required on pesticides that EPA had earlier registered under FIFRA. FIFRA provisions specify the conditions for, and limitations on, temporarily suspending a pesticide use due to impacts on listed species. 7 U.S.C. §§ 136(*l*) (definition of "imminent" hazard" as an "unreasonable hazard to the survival of" an ESA-listed species), 136d(c) (EPA may suspend a pesticide use only if "necessary to prevent an imminent hazard"). The panel rejected the arguments of EPA and intervenor CropLife that the specific FIFRA provisions constrained the authority of agencies and courts to enjoin or suspend a pesticide use in certain areas. The panel found "an agency cannot escape its obligation to comply with the ESA merely

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C. EPA Did Not Act In An Arbitrarily Inconsistent Manner

The other portion of the question posed by this Court is whether the court below correctly held that EPA's decision to transfer NPDES permitting authority to Arizona was arbitrary because it was based on inconsistent interpretations of ESA § 7(a)(2). The material below explains why the answer is "no."

1. It is true that EPA and FWS agency staff at various levels were feeling their way through difficult issues as they considered whether and how ESA § 7(a)(2) applied to a CWA § 402(b) transfer with respect to Arizona. Local and regional staff of EPA and FWS – without definitive legal advice – offered different views as the issue was "elevated" from local to regional to national levels. *See Defenders*, 420 F.3d at 952-54 (Fed. App. 6a-12a).

The details about what EPA said at what earlier time should be irrelevant or harmless error at this point. *See* Section I.B, above.

2. With respect to EPA's alleged arbitrariness, it is highly significant that, in a similar CWA § 402(b) transfer setting, the Fifth Circuit stated "Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action," but neither the ESA nor CWA § 402(b) allows EPA to withhold or condition a transfer

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because it is bound to comply with another statute" – the "FIFRA remedies [do not] trump those Congress expressly made available under ESA." 413 F.3d at 1032, 1034; *see id.* at 1034-35 ("the appropriate remedy for [procedural] violations of the ESA consultation requirements is a [substantive] injunction," even if the injunction countermands the FIFRA suspension provisions).

based on impacts to listed species. *AF&PA v. EPA*, 137 F.3d at 297-99 (ESA § 7(a)(2) "confers no substantive powers"; "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA"). *Agency staff can scarcely be found arbitrary for following the leading circuit court opinion of the era that EPA is required "to consult."*

3. Another reason why EPA was not arbitrary is that nothing in the ESA bars an agency from being careful by *voluntarily* initiating consultation on any action. ESA § 7 states that each "Federal agency shall, in consultation with" the Services, "insure that any action authorized, funded, or carried out" by an agency is not likely to jeopardize a listed species with extinction. 16 U.S.C. § 1536(a)(2). An agency like EPA can responsibly decide to "insure" by consulting even if consultation may end up not being legally required. Moreover, such a "consultation" furthers the "conservation" objective of ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1), even if consultation is not technically required by § 1536(a)(2).

Consulting in such a grey area eliminates a litigation issue over whether "consultation" is legally required where the ultimate conclusion, as here, is that the agency action substantively satisfies ESA § 7(a)(2). Successfully completing an arguably optional process is rational, not arbitrary, because it *eliminates* (not creates) litigation issues.[11] And again, EPA staff did not act arbitrarily by

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[11] For example, agencies often prepare an environmental impact statement ("EIS") to remove an issue from litigation, where there is a concern that some court would find that an EIS is required by the National Environmental Policy Act ("NEPA"). Where an EIS has been prepared, courts normally do not consider the issue of whether the agency acted arbitrarily in choosing to prepare an EIS. This is particularly true where the EIS is found to have satisfied

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consulting in light of a Fifth Circuit opinion that the ESA "requires EPA to consult." *AF&PA v. EPA*, 137 F.3d at 298. EPA's approach was careful, not arbitrary.

4. Assuming *arguendo* that the details of EPA's final action – its transfer of NPDES authority to Arizona at 67 Fed. Reg. 79,629 (Dec. 30, 2002) – are pertinent, they do not demonstrate any clearly inconsistent EPA positions.

To begin with, Judge Kozinski undoubtedly is correct that the disagreements among lower-level staff are meaningless. The "agency's final action . . . is the only one we are entitled to review. *See* 5 U.S.C. § 704." *Defenders*, 450 F.3d at 396 (Fed. App. 71a). A preliminary ruling by a "subordinate official" is not reviewable final agency action. *E.g., Dalton v. Specter*, 511 U.S. 462, 469-70 (1994); *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967). And, as equitable estoppel does not apply against the government, the agencies' views can evolve and change over time. *Office of Personnel Mgmt. v. City of Richmond*, 496 U.S. 414, 419-23 (1990).[12]

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NEPA. Similarly here, if this Court finds that the agencies satisfied ESA § 7(a)(2), the issue of whether EPA acted arbitrarily in initiating consultation falls by the wayside.

[12] *See Schweiker v. Hansen*, 450 U.S. 785, 788-90 (1981). An agency's final view may differ from the view of some staff, and the agency's current view obtains judicial deference. *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-86 (2005); *Santa Fe Pacific R.R. v. United States*, 294 F.3d 1336, 1343 (Fed. Cir. 2002); *Springfield, Inc. v. Buckles*, 292 F.3d 813, 819-20 (D.C. Cir. 2002). The existence of disagreements within the agencies signifies the questions were "difficult," not that the agency acted arbitrarily. *Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16, 22 (D.D.C. 2001).

Accordingly, if the Court disregards the later clarification of the agencies' position found in Fed. App. 93a-116a, the reviewable final agency actions are FWS's reasoning in its biological opinion, and EPA's final action in approving the transfer based on that opinion. *Bennett v. Spear*, 520 U.S. at 177-79. Those actions do not show that EPA was arbitrarily inconsistent.

a. FWS's reasoning in the final biological opinion was that EPA's transfer of NPDES permitting authority was compelled by CWA § 402(b), and was not the "cause" of any impacts to listed species that are within the purview of ESA § 7(a)(2).[13]

This is very close to the position EPA had earlier summarized in the "elevation" document.[14]

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[13] *See* NAHB Pet. App. 80, 111-17. The "transfer of the permit authority will not cause the continued real estate development" – the potential impacts to listed species that might occur from private development are not "indirect effects of the approval action." *Id.* 80, 114. The "absence of the section 7 process" for State-granted NPDES permits "reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." *Id.* 114. "EPA Region 9 has determined that it does not have the legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS. . . . . We defer to EPA in regard to its interpretation of the CWA." *Id.* Thus, FWS at least implicitly found that, where a statute (like CWA § 402(b)) does not confer the authority to act based on wildlife impacts, the federal agency is not taking a "discretionary" action within the meaning of 50 C.F.R. § 402.03 which is subject to ESA § 7(a)(2).

[14] "EPA Region 9 also believes that its approval action, which is an administrative transfer of authority, is not the cause of future non-water-quality-related impacts on endangered species from projects requiring State NPDES permits. . . . EPA Region 9 notes . . . that section 402(b) of the CWA states that EPA 'shall' approve the (continued....)

Accordingly, the contemporaneous final view of both EPA and FWS was that EPA is not the "cause" of impacts which the agency lacks discretionary authority to control under CWA § 402(b). In other words, ESA § 7(a)(2)'s substantive constraints operate only where the agency has the discretionary authority to make a decision based on wildlife concerns under its organic law. This aspect of the agencies' contemporaneous position does not differ materially from Federal Petitioner's current position.

As there has been no change in *that* interpretation, there is no arbitrary inconsistency that might affect the desirability of rendering a decision on the merits. Hence, the Court should provide guidance on whether ESA § 7(a)(2) is an overriding substantive constraint, or instead operates only where the agency has the discretionary authority to make a decision based on wildlife concerns under its organic law.

b. EPA and FWS did not take the further step of contemporaneously considering that, as a potential consequence of their final position, not even the procedural "consultation" aspect of ESA § 7 would apply to a transfer compelled by CWA § 402(b). Since the agencies have proffered a consistent interpretation of ESA § 7(a)(2) now, this seems to render moot the question regarding whether EPA had earlier been arbitrarily inconsistent. *See* Section

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state program if it meets certain specified criteria pertaining to protection of water quality, permitting procedures, and enforcement. Based on this language, the U.S. Court of Appeals for the Fifth Circuit has held that EPA lacks authority to condition its approval of a State's NPDES program on requirements (specifically requirements related to protection of listed species) that are not specifically enumerated in section 402(b) of the CWA." NAHB App. 564-65.

I.B, above. If that question is inconsequential now, EPA was *not* arbitrarily inconsistent for several reasons.

First, EPA's final action does not definitively state a legal interpretation that ESA § 7 consultation applies procedurally, but that § 7(a)(2)'s substantive constraints do not apply. *See* 67 Fed. Reg. 79,629 (Dec. 30, 2002).

Second, EPA's explanation upon approving Arizona's program can be comfortably read to mean that EPA has successfully completed whatever "consultation process [is] required by ESA section 7(a)(2)," without purporting to resolve whether consultation is legally required. *Id.* EPA could then make the transfer without dwelling on the then-unimportant question of whether "consultation" was legally required. Judge Kozinski is correct that this "perfectly logical sequence of events" is not "'nonsensical' and impermissible." *Defenders*, 450 F.3d at 397 (Fed. App. 73a). The panel's surmise confuses the preliminary views of EPA staff[15] with EPA's final action. Agencies should not be found arbitrary based on such speculation.

Third, the Fifth Circuit's opinion that the ESA "requires EPA to consult" (*AF&PA v. EPA*, 137 F.3d at 298) still may have exerted a strong influence at the time of the Arizona program approval. EPA did not act arbitrarily simply because it did not question, and perhaps followed, that appellate ruling.

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[15] Looking at the record in a manner favorable to Respondents, the view of Terry Oda, the Manager of the CWA Standards & Permits Office in EPA Region IX, and the staff who prepared the biological evaluation for that Office, was that EPA must initiate formal ESA consultation. NAHB App. 583-88. But the views of agency staff do not bind the agency. *See* note 12, above. For this reason as well, there is no meaningful arbitrariness in EPA's final position.

EPA and FWS have now eliminated any arguable inconsistency by explaining why ESA § 7(a)(2) consultation does not apply to CWA § 402(b) transfers. Fed. App. 96a-102a, 104a-110a. After the panel opinion made this an issue, EPA and FWS stated consistent positions in their rehearing petition, in an exchange of high-level agency letters, and in the petition for certiorari. As a result, the Court should reach the issue of whether ESA § 7(a)(2) consultation applies to transfers compelled by CWA § 402(b).

II. ESA § 7(a)(2)'s Elements On "Consultation" And Jeopardy-Avoidance May Not Apply To Precisely The Same Agency Actions

In this Section, *Amicus* provides an alternative basis for finding that EPA was not arbitrarily inconsistent. There is substantial authority that the types of "agency actions" to which procedural ESA § 7 "consultation" duties attach are *not identical* to the "agency actions" to which ESA § 7's substantive constraints apply. Accordingly, any earlier EPA recognition of that difference is not arbitrary.

Further, it bears emphasizing that, under ESA § 7 rules (including rules ratified by Congress), only a limited class of agency actions require "consultation" with the Services. The Court's recognition of those uncontested rules would avoid an inadvertent ruling that a duty to "consult" with the Services attaches to each and every federal agency action where the federal agency has discretion under its organic statutes to act based on impacts to wildlife. The delays associated with such a broad "consultation" duty on the thousands of actions agencies take each day would create gridlock.

The court below assumed, and then held, that "[*b*]*oth* the consultation obligation and the obligation to 'insure' against

jeopardizing listed species are triggered by 'any action authorized, funded, or carried out by' a federal agency." *Defenders*, 420 F.3d at 961 (Fed. App. 26a). Later, the court below interpreted ESA § 7(a)(2) to create overriding duties that apply to each and every federal agency action. ESA § 7(a)(2) "confers authority and responsibility in agencies to protect listed species when the agency engages in an affirmative action that is both within its decisionmaking authority and unconstrained by earlier agency commitments." *Defenders*, 420 F.3d at 967 (Fed. App. 38a-39a).

Yet, the "agency actions" on which procedural "consultation" with the Services are conducted need not be the same as the "agency actions" to which ESA § 7(a)(2)'s substantive constraints apply.

1. In some circumstances, "consultation" could cover a *broader* range of actions. Nothing in the ESA bars an agency from *voluntarily* initiating consultation on any action, even if consultation is not clearly mandatory. That is what happened here. EPA did not act arbitrarily by being conservative and careful. *See* Section I.B and C.

2. Conversely, there is substantial authority that "consultation" with the Services is required only for a narrower subset of actions that are within the set of "action[s] authorized, funded, or carried out" by federal agencies. That is, action-specific "consultation" applies to a *narrower* class of actions ~~than do~~ ESA § 7(a)(2)'s substantive constraints.

The four Justices who reached one aspect of standing seemed to reason that, under the structure of ESA § 7(a)(2), the action agency has the "responsibility for determining statutory necessity" for "consultation." *Lujan v. Defenders*,

504 U.S. at 568-69. Their reasoning strongly implies that agencies such as EPA have some discretion over the types of actions on which they will consult.

Further, under uncontested ESA § 7 rules, action-specific "consultation" with the Services is required or suggested[16] only for a subset of the thousands of "agency actions" that federal agencies do take – and need to take – each day.

a. The standard or default ESA § 7 rules do not require action-by-action consultation with the Service as a prerequisite to taking any and every "agency action." Those rules create three levels of § 7 procedures.[17] This triage

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[16] We say "suggested" because the position of the United States, and the apparent view of the four Justices reaching the issue, is that the Services' 50 C.F.R. Part 402 rules do not bind other agencies. *Lujan v. Defenders*, 504 U.S. at 568-71.

[17] The first level in the triage system allows actions to go forward with *no consultation with the Services* unless the action agency concludes the action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a) (2006); *see* 50 C.F.R. § 402.04(a)(2) (1979) (the similar predecessor ESA § 7 rules, adopted in 1978). This avoids delaying the myriad actions federal agencies take each day that plainly do not affect listed species.

A second level of ESA § 7 procedures is provided for federal actions that are "not likely to adversely affect listed species or critical habitat" ("NLAA actions"). For the NLAA category of actions, the default rules require only "informal consultation" with the Service. 50 C.F.R. §§ 402.13(a), 402.14(b). Informal consultation ends the ESA § 7 procedures if "it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat." *Id.* As informal consultation does not produce the Service's written biological opinion or the incidental take statement described in ESA § 7(b), 16 U.S.C. § 1536(b), it arguably is not "consultation" in some ESA § 7 senses.

The third level is "formal consultation." 50 C.F.R. § 402.14. Only formal consultation contains all the "consultation" elements

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system helps deploy limited ESA resources effectively and efficiently. It also avoids unwarranted delays in federal actions that do not present significant issues regarding substantive compliance with ESA § 7(a)(2).

As a district court recently held in the context of affirming some special ESA § 7 rules on consultation, Congress ratified the concept that ESA § 7 consultation is not required on every agency action. "[B]ecause Congress reviewed the [nearly identical] default consultation procedures in 1978, and passed ESA amendments codifying them, the Court must conclude that Congress" ratified 1978 rules that do *not* require "consulting the Services if [the action agency] concluded that [the action] had 'no effect' on listed species and their critical habitat." *Defenders of Wildlife v. Kempthorne*, No. 04-1230 (GK), 2006 WL 2844232 at *19 (D.D.C. Sept. 29, 2006). That is, the 1978-adopted ESA § 7 rules, like the current rules (adopted in 1986), require no "consultation" at all on proposed federal actions the action agency finds would not affect listed species. 50 C.F.R. § 402.04(a)(3) (1979); 50 C.F.R. § 402.14(a) (2006).

The district court correctly found that, in the *1978* ESA Amendments, Congress acquiesced in those rules.[18] Further,

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described in ESA § 7(b), such as the Service's preparation of a written biological opinion. The default rules only require formal consultation on an individual action that is "likely to adversely affect listed species or critical habitat." 50 C.F.R. § 402.14(b).

[18] The legislative history of the 1978 ESA Amendments demonstrates that Congress was aware of, and acquiesced in, the 1978 ESA § 7 rules:

> The basic premise of S.2899 is that the integrity of the interagency consultation process designated under section 7 of

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in *1979*, Congress amended the ESA to conform to the Services' ESA § 7 regulations and other law:

> The amendment, which would require all Federal agencies to ensure that their actions are not likely to jeopardize endangered or threatened species or result in the adverse modification of critical habitat, brings the language of the statute into conformity with existing agency practice.

H.R. Conf. Rep. No. 96-697 at 12, 1979 U.S.C.C.A.N. 2572, 2576. Finally, in the *1982* ESA Amendments, Congress adopted portions of the ESA § 7 rules as statutory standards.[19]

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> the act be preserved . . . . The Conferees felt that the Senate provision, by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Conf. Rep. No. 95-1804 at 18, 1978 U.S.C.C.A.N. 9484, 9486. The Senate Report quotes approvingly that, "[u]nder the current section 7 regulations, Federal agencies have the responsibility to identify activities or programs which they undertake that may affect listed species or their critical habit and to request consultation with the Services concerning those activities or programs." S. Rep. No. 95-874, at 6 (1978). Where Congress is aware of regulations and amends the statute in other respects, Congress presumptively has acquiesced in the regulatory interpretation. *E.g., Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *Bob Jones Univ. v. United States*, 461 U.S. 574, 601-02 (1983). Thus, Congress acquiesced in the regulatory view that consultation with the Services is not required on every federal agency action.

[19] ESA § 10(a)(2) allows the Services to issue incidental take permits on certain conditions. One condition is that the incidental "taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv). The Conference Report describes that language as adopting the regulatory standard for substantive compliance with ESA § 7(a)(2):

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All of this illustrates a legislative policy of acquiescence and deference to the Services' view of the flexibility in ESA § 7. In sum, Congress and the Services have clarified that "consultation" with the Services is not a legal prerequisite to each and every "action authorized, funded, or carried out" by a federal agency.

b. Of further relevance, the Services have adopted two alternative sets of ESA § 7 compliance procedures for time-sensitive projects. They are called "joint counterpart rules" and they "supersede[ ]" the ESA § 7 default rules. 50 C.F.R. § 402.04. One set of rules concerns EPA pesticide registration actions under FIFRA. 50 C.F.R. §§ 402.40-402.48 (2006), 69 Fed. Reg. 47,732 (Aug. 5, 2004). The other set of ESA counterpart rules concerns approval of projects implementing the National Fire Plan. 50 C.F.R. §§ 402.30-402.34 (2006), 68 Fed. Reg. 68,254 (Dec. 8, 2003).

Both sets of counterpart rules draw on, and extend, the flexibility in § 7 procedures found in the default rules. The primary innovation in both sets of counterpart rules is eliminating the need to obtain the Service's sign-off in

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> The Secretary would base his determination as to whether or not to grant the permit, in part, by using the same standard as found in section 7(a)(2) of the Act, as defined by Interior Department regulations, that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild.... [This Act uses] regulatory language adopted by the Secretary of the Interior to implement section 7(a)(2).

H.R. Conf. Rep. No. 97-835, at 29 (1982), 1982 U.S.C.C.A.N. 2860, 2870; *see* 50 C.F.R. § 402.02 (definitions of "jeopardize the continued existence" and "destruction or adverse modification"). *Congress deferred to the Services' rules* on standards for ESA § 7 compliance.

informal consultation (*see* 50 C.F.R. § 402.13) on an action that the action agency concludes "may affect" but is "not likely to adversely affect" listed species. 50 C.F.R. §§ 402.33, 402.45. No action-specific "consultation" with the Services is conducted on those NLAA actions. The alternative procedures adopted by the Services and Service oversight provide a level of programmatic "consultation" satisfactory to the Services.

The Services explained their reasons for adopting these innovations in the preambles to the counterpart rules. One reason is to create a more efficient process. Since informal consultation still requires the review and concurrence of the Services' overworked biologists, significant delays have been common.[20] There is a reasonable position that these delays are unnecessary. A proposed action that is not likely to adversely affect even one member of a listed species clearly would be approved under § 7(a)(2), which only prohibits a federal action likely to jeopardize the continued

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[20] The Government Accountability Office ("GAO") has described that, for the reviewed Service offices in the Pacific Northwest, "nearly 40 percent of the 1,548 consultations completed by the Services exceeded established timeframes," and the "Services missed established timeframes, most often for informal consultation." *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* at 14 (GAO-04-93 March 2004). The principal reasons for delays included: (1) "the Services told us that they still do not have enough resources to handle their consultation workloads"; (2) "[s]taffing level problems are exacerbated by high turnover of biologists at the Services"; (3) "action agency officials thought the documentation needed for the consultation process was similarly getting out of control"; and (4) "biologists at the Services are sometimes unfamiliar with action agency programs and activities," which "can lengthen the consultation process." *Id.* at 40, 42, 50, 53. The GAO Report (at 19-39, 60) looks favorably on efforts to improve the § 7 consultation process, including greater use of programmatic consultations.

existence of the *entire* listed species. Thus, the innovation allows limited ESA § 7 "consultation" resources to be devoted to the subset of agency actions that may pose legitimate questions on substantive compliance with § 7(a)(2)'s standards.

Both sets of ESA counterpart rules were challenged by environmental groups. Those rules have received different receptions in two district courts.

The rules for National Fire Plan projects were sustained under an analysis that ESA § 7 provides flexibility on which actions require consultation with the Services. *Defenders of Wildlife v. Kempthorne*, 2006 WL 2844232 at *13-19. "The ESA language at issue requires 'consultation' on projects that might affect a listed species, but leaves room for the Secretary to determine how, precisely, that consultation should occur.... [T]he Court cannot find that the Counterpart Rules are inconsistent with the ESA's 'consultation' requirement." *Id.* at *19. District Judge Kessler noted that, if Plaintiffs were correct that ESA § 7 requires "consultation" before any federal action can be taken, the longstanding ESA § 7 default rules "would be invalid because [they do] not mandate consultation on each and every federal action." *Id.*

Another district court set aside, for several perceived errors, portions of the ESA § 7 counterpart rules for EPA's pesticide registration program under FIFRA. *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006), *appeals pending*, Nos. 06-35873, 06-35891, 06-35899 (9th Cir.). One basis was the panel's ruling in the case at bar: *Defenders* creates a binding Ninth Circuit precedent that "*Both* the consultation obligation and the obligation to 'insure against jeopardizing listed species are triggered by 'any action authorized, funded, or carried out by

such agency,' and *both* apply if such an 'action' is under consideration." *Id.* at 1177-78 (quoting *Defenders*, 420 F.3d at 961). Thus, under the logic of *Washington Toxics* and the panel opinion in *Defenders,* both the ESA § 7 default rules and counterpart rules are unlawful, as they do not require "consultation" on every and "any action authorized, funded, or carried out by such agency."

c. In view of the information presented above, CropLife urges the Court to avoid incidental statements about the scope of ESA § 7(a)(2) "consultation" that might undercut the legality of the ESA § 7 rules.

d. The history and context provided above on "consultation" illustrate two broader, concluding points. First, it is not entirely accurate to say that one "would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). As shown above, ESA § 7 is ambiguous as to when "consultation" is required. Legislative intent and longstanding § 7 rules refute what might be one of several alleged plain meanings of the statutory text.

Similarly, CropLife trusts that Petitioners and other *amici* will show that the "utilize their authorities" language in 16 U.S.C. § 1531(c)(1) and in the original ESA § 7 (87 Stat. 892 (1973)) allows the agencies to construe ESA § 7 as only directing federal agencies to "take steps within their power" under their organic statutes to protect listed species, where non-ESA law allows the agency to make decisions based on wildlife concerns. *TVA v. Hill*, 437 U.S. at 183 (quoting the House manager's description of the Conference bill). The scope and meaning of ESA § 7 are not that plain after all.

Second, as ESA § 7 is ambiguous, courts should defer to the agencies' reasonable construction. "When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary." *Babbitt v. Sweet Home Chapt. of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) (sustaining FWS's regulation defining the "harm" form of ESA § 9 "take" of listed wildlife). "Fashioning appropriate standards" involves a "complex policy choice" which is primarily for the expert agencies. *Id.* If "Congress did not unambiguously manifest its intent to adopt respondents' view," the agencies' "reasonable [interpretation] suffice[s] to decide this case." *Id.* at 703. Those guideposts apply equally to ESA § 7.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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